Editor's note: appeal filed No. 61-89L (Cl.Ct.)

POGO PRODUCING CO.

IBLA 86-1287 Decided November 10, 1988

Appeal from a decision of the Director, Minerals Management Service, denying refunds for certain excess royalty payments. MMS 85-0119-OCS.

Affirmed.

1. Outer Continental Shelf Lands Act: Refunds

Sec. 10 of the Outer Continental Shelf Lands Act, 43 U.S.C. | 1339 (1982), authorizes the issuance of refunds for excess royalty payments only where the request for a refund is made within 2 years of the date that payment is received in the appropriate office.

APPEARANCES: Thomas J. Eastment, Esq., Washington, D.C., for appellant.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

Pogo Producing Company (Pogo) has appealed from a decision of the Director, Minerals Management Service (MMS), dated April 7, 1986, denying, in part, a request for a refund of certain royalties which had been cal- culated and paid pursuant to Federal Energy Regulatory Commission (FERC) Order Nos. 93 and 93A.

The two FERC orders in question established final rules applicable to the sale of natural gas regulated under the Natural Gas Policy Act of 1978 (NGPA), 15 U.S.C. || 3301-3432 (1982). The orders resulted in the adoption of what was known as the "dry rule" which had the effect of raising the prices paid to producers. This increase in payments to producers neces- sarily led to increased royalty payments to the lessors, including the United States.

However, on judicial review of these orders, initiated by certain gas pipeline and distribution companies, the Court of Appeals for the Dis- trict of Columbia vacated them as inconsistent with the NGPA. Interstate Natural Gas Association of America v. Federal Energy Regulatory Commission, 716 F.2d 1, 14 (D.C. Cir. 1983), cert. denied, 465 U.S. 1108 (1984) (Interstate). As a result of this holding, FERC required natural gas pro- ducers to pay refunds to their customers. Accordingly, the producers sought refunds for excess royalty payments made to the Federal Government. Among the producers seeking refunds was Pogo, appellant herein.

In its decision ruling on Pogo's refund request, MMS noted that appel- lant had filed a refund request on November 5, 1984, for royalty overpay- ments made during the period from December 1978 through December 1983. The decision further noted that:

> By a letter dated May 28, 1985, the [MMS] Regional Manager, Houston Regional Compliance Office, denied the refund request to the extent of $859,135.91. The refund request was disallowed (as to royalty payments made prior to November 9, 1981) on the basis of the 2-year limitation contained in section 10 of the Outer Continental Shelf Lands Act (OCSLA) (43 U.S.C. 1339).

In affirming the regional manager's decision, the Director, MMS, briefly elaborated:

> After FERC Order Nos. 93 and 93A were declared invalid, the Director, MMS, denied certain royalty refund requests concerning these orders. Insofar as it is relevant, the Director's order denied the refund requests to the extent that the royalties involved were paid before November 9, 1981, pursuant to Federal Outer Continental Shelf leases. The denial was published in a Federal Register Notice on November 30, 1984 (49 FR 47120).

The Director, MMS, concluded that the refund request by Pogo for royal-ties paid before November 9, 1981, should be denied based on his interpre-tation of section 10 of OCSLA, supra. This statute provides, in pertinent part:

> [W]hen it appears to the satisfaction of the Secretary that any person has made a payment to the United States in connection with any lease * * * in excess of the amount he was lawfully required to pay, such excess shall be repaid without interest to such per- son or his legal representative, if a request for repayment of such excess is filed with the Secretary within two years after
> the making of the payment * * *.

The issue whether section 10 of OCSLA served to bar refunds of excess royalty payments made before November 9, 1981, was the subject of numerous appeals to this Board. A number of the appeals were ultimately consoli- dated, resulting in a decision styled Shell Offshore, Inc., 96 IBLA 149,
94 I.D. 71 (1987). Since, as even counsel for appellant recognizes, the sole issue presented by this appeal is whether section 10 of OCSLA poses
a bar to refund of royalty payments made prior to November 9, 1981, the exact issue adjudicated in Shell Offshore, Inc., supra, it is necessary to examine that decision.

[1] In Shell, the Board first focussed on the actual wording of section 10 of OCSLA. Appellants had argued therein that the 2-year period referenced in the statute did not commence to run until they were aware or should have been aware that a refund was due and owing. In rejecting this interpretation, the Board noted that the statute utilized the term "making of the payment" as the triggering event for the computation of the 2-year

period. The Board considered this phrase critical to an understanding of the legislative scheme. Thus, it observed:

> The wording "making of the payment" * * *, as the present case makes abundantly clear, does not identify an event which necessarily coincides with the event by which a right to a refund accrues. While Congress may have intended to merely substitute
> an equivalent term appropriate to the OCS leasing system in order to grant the Secretary sufficient authority to handle refunds, the language chosen was not adequate for the purpose. The statute conditions the authority of the Secretary to make repayment upon
> a request being filed "within two years after the making of the payment." A payment is made when it is tendered to the appropri- ate agency. William E. Phalen, 85 IBLA 151 (1985); Mobil Oil Corp., 35 IBLA 265 (1978). There is no ambiguity in the wording of the statute; the terms of the Act cannot be varied simply because the appellants may for other reasons appear to deserve refunds. See 2A Sutherland, Statutes and Statutory Construction
> | 46.01 (4th ed., rev. 1984).

96 IBLA at 165, 94 I.D. at 78-79.

In view of the foregoing, the Board concluded that the Department had been vested with authority to issue refunds only in those situations in which the request for a refund was filed within 2 years of the tender of the payment to which it related. Moreover, not only did the Board reject the contention that a lessee seeking a refund had 2 years from the date that it became aware that a refund was due in which to seek a refund, the Board also challenged appellant's contention that the payments were not, in
fact, in excess of what was required until the Circuit Court so ruled in Interstate:

> Because 43 U.S.C. | 1339 (1982) constitutes a grant of administrative authority, it is necessary to reject appellants' arguments that their 2-year period did not begin until they were aware a refund was due. The refunds at issue did not become due because of the Interstate ruling. Payments made by producers under the dry rule were always in excess of the lawful amount; the circuit court decision merely confirmed this fact. MMS is correct that, as the plain language of the statute indicates, the 2-year period for requesting refunds begins with the date of "the making of the payment." Accordingly, we affirm the result reached in Phillips Petroleum Co. [39 IBLA 74 (1979)] that under the statute a right to a refund must be asserted within 2 years of the date of payment.

Id. at 166, 94 I.D. at 79.

Having determined that lessees interested in obtaining refunds of excess royalties must request the same within 2 years of the date of the making of the payment, the Board then turned to the question of what consti-tuted proper notice of a request for refund under OCSLA. Since MMS had

failed to promulgate any regulations to govern such requests at the time of the D.C. Circuit decision, the Board found that "the only standard which may be applied is that of the language of [43 U.S.C.] section 1339 itself." Id. at 173, 94 I.D. at 83. The Board noted:

> If Congress had wished, it could have written specific require- ments into the statute. Instead, it appears to have left the matter to the Department, and the only affirmative requirement indicated by the statute is that some form of written request is required. Undoubtedly, to be effective a request must in some manner inform MMS of the subject of the refund rather than merely stating "I want a refund"; however, the statute does not limit the form a request may take. While in the normal course of business notice would likely be given by letter, the statute does not spec-ify a particular type of document. Thus, in reviewing appellants' cases, MMS should consider whether other documents received from lessees provided notice that the submitting party desired a refund.

Id. at 174, 94 I.D. at 83-84.

Finally, the Board provided the following instructions to MMS:

> [B]ecause MMS does not deny that the producers may obtain refunds for overpayments made on or after November 9, 1981, we will con- strue its letter as an acknowledgement of notice that as a result of the circuit court decision in Interstate all producers would seek refunds. Accordingly, refunds may be obtained for overpay- ments make on or after November 9, 1981. Producers who believe they filed notice with MMS prior to November 9, 1983, and are therefore entitled to a refund for overpayments made prior to November 9, 1981, should submit to MMS documentation establishing the fact. The producer should also submit an application showing its entitlement to a refund by providing the data required by MMS in its published notices.

Id. at 176, 94 I.D. at 84-85. See also Conoco Inc., 96 IBLA 384 (1987). In our present case, appellant has raised no matter not fully considered in our decision in Shell and we expressly adhere to our analysis therein.

The facts as outlined in the decision on appeal indicate that appel-lant filed a request for refund on November 5, 1984. MMS disallowed the refund request as to royalty payments made prior to November 9, 1981, there-by employing in this instance the date of the MMS notice to producers and not the date of appellant's request in determining eligibility for refunds. This is in accord with our holding in Shell. Appellant does not contend that it made any request for a refund prior to November 9, 1983. Absent such a request, the MMS decision to disallow, in part, appellant's refund request was correct.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

James L. Burski
Administrative Judge

I concur:

R. W. Mullen
Administrative Judge